APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2002
(Argued: January 17, 2003 Decided: May 6, 2003)

Docket No. 02-7457

SOLOMON LANGMAN,
Plaintiff-Appellant

--v.—

EMANUEL LAUB, JAMES JOHNSON, MEL WEITZ, HAROLD FRIEDMAN, JON GREENFIELD, SAM PELZ, MANUEL MONACO, HECTOR TORRES, and SIDNEY BLUMGOLD, trustees of Local 338 Retirement Fund; RETAIL, WHOLESALE AND CHAIN STORE FOOD EMPLOYEES UNION RETIREMENT TRUST BOARD OF TRUSTEES, Administrator of Local 338 Retirement Fund; and LOCAL 338 RETIREMENT FUND,
Defendants-Appellees.

Before:
VAN GRAAFEILAND and B.D. PARKER, JR., Circuit Judges, and RAKOFF, District Judge.*

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* The Honorable Jed S. Rakoff, United States District Court for the Southern District of New York, sitting by designation.

Appeal from a judgment of the United States District Court for the Southern District of New York (Miriam Goldman Cedarbaum, *Judge*) granting summary judgment to defendants-appellees on plaintiff-appellant's ERISA claims. We affirm.

EDGAR PAUK, New York, NY (Scott Riemer on brief), for Plaintiff-Appellant.

EUGENE S. FRIEDMAN, Friedman & Wolf, New York, NY (William K. Wolf and Erinn Weeks Waldner on brief), for Defendants-Appellees.

RAKOFF, *District Judge*:

Plaintiff-appellant Solomon Langman appeals from a judgment of the United States District Court for the Southern District of New York (Miriam Goldman Cedarbaum, Judge), granting summary judgment to defendants-appellees. See Langman v. Laub, 2002 U.S. Dist. LEXIS 5106, 97 Civ. 6063, 2002 WL 472033 (S.D.N.Y. Mar. 28, 2002). Although our interpretation of the applicable law differs somewhat from that of the district court, we agree with its conclusion that plaintiff received all the pension benefits to which he was entitled. Accordingly, we affirm the judgment.

The pertinent facts are undisputed. For many years, Local 338 of the Retail, Wholesale and Chain Store Food Employees Union has maintained, in conjunction with various employers, a pension plan for its retired workers (the "Plan"). At numerous times, the Plan was amended so as to increase benefits, across-the-board, for all current employees. On four occasions, moreover, the Plan was more generally amended, specifically in 1976, 1981, 1984, and 1994. Since 1974, the Plan has been governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq.

From 1953 through 1973, Langman worked at Waldbaum's, Inc. in a position covered by the Plan, but in August 1973 he transferred to a non-covered position at Waldbaum's where he remained until he left Waldbaum's employ in June 1979. Four months later, in October 1979, Langman resumed covered employment with a different employer, and continued in this position until his retirement on May 1, 1996.

Pursuant to Amendment No. 8 to the 1994 Plan, an employee who, like Langman, claims early retirement on or after January 1, 1996 is entitled to receive a monthly pension equal to a benefit rate of $50 multiplied by the number of years of his service in covered employment. However, under Article V, §7 of the 1994 Plan (the "1994 separation provision") the benefit rate for a claimant who previously "separated from employment"-- i.e., who worked fewer than 500 hours in covered employment during an applicable 12-month period -- is "pro rated," so that for the portion of his covered service that preceded the separation, he receives only the benefit rate in effect at the time of his separation.[1]

Construing these provisions, defendants initially calculated plaintiff's monthly pension by applying the $ 50 benefit rate that was in effect at the time Langman retired only to the portion of his employment subsequent to his return to covered service in 1979, and applying to the earlier

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[1] Specifically, Article V, § 7 provides in pertinent part:
An Employee shall be deemed to have separated from employment on the last day in which he receives an Hour of Service which is followed by a Plan Year in which he receives fewer than 500 Hours of Service. If such Employee subsequently returns to employment his pension amount will be determined on a pro rata basis. The amount of pension based on Benefit Service earned before his separation from employment shall be determined under the terms of the Plan on his first separation from employment.

portion of his covered employment prior to his separation in 1973 the $5 benefit rate that was in effect at the time of his separation. However, after realizing that the pro rata formula for employees who had previously separated was not introduced into the Plan until 1984,[2] and that use of the $ 5

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[2] Specifically, Article IV, § 6 of the 1984 Plan (the "1984 separation provision") provides:

In the event of the return to employment as an Employee of a person who was receiving a retirement benefit, or any other person who sustains a One Year Break hereunder, the following provisions shall govern upon his subsequent termination as an Employee:

(a) With respect to his Benefit Service and Vesting Service prior to his reemployment, he shall receive the same pension or prospective pension as before, actuarially reduced to reflect the value of payments, if any, made during his prior period of retirement which were paid prior to his Normal Retirement Age, and

(b) If after his return as an Employee he renders three or more years of Vesting Service, he shall receive an additional benefit based upon the additional number of years of Benefit Service rendered and the benefit level in effect when he subsequently terminates service as an Employee, and

(c) If after his return as an Employee he renders less than three years of Vesting Service, he shall receive an additional benefit based upon the additional number of years of Benefit Service rendered and the benefit level in effect when he first terminated service as an Employee, provided

rate would therefore retroactively diminish Langman's benefit in violation of ERISA, defendants increased the benefit rate for the pre-separation period to $ 20, i.e., the benefit rate in effect when the separation provision was first introduced in 1984.

Despite this adjustment, Langman commenced this lawsuit, claiming that he was entitled to the $ 50 benefit rate for the entire period of his covered employment. By Opinion dated March 28, 2002, the district court denied plaintiff's motion for summary judgment in its entirety, and granted defendants' motion for summary judgment with respect to all claims. On appeal, Langman's primary argument is that defendants' calculation violated ERISA's 133-1/3 percent accrual test set forth in ERISA § 204(b)(1)(B), 29 U.S.C. §1054(b)(1)(B), which provides that:

> A defined benefit plan satisfies the requirements of this paragraph of a particular plan year if under the plan the accrued benefit payable at the normal retirement age is equal to the normal retirement benefit and the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year is not more than 133 1/3 percent of the annual rate at which he can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year. For purposes of this subparagraph-

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(d) In no event shall the benefit upon subsequent termination of service be of smaller amount than would be due on account of all his Vesting Service taken together with his Benefit Service rendered after his return as an Employee.

> (i) any amendment to the plan which is in effect for the current year shall be treated as in effect for all other plan years; [and]
>
> (ii) any change in an accrual rate which does not apply to any individual who is or could be a participant in the current year shall be disregarded[.]

Langman asserts that since the $ 50 benefit rate used to calculate his pension benefits for the later years is more than 133 1/3 percent of the benefit rate used to calculate his pension benefit for the earlier years, defendants' calculation -- and, more generally, the separation provisions on which it is premised -- violates the 133 1/3 percent test.

This argument, however, completely misapprehends the acknowledged purpose of the 133 1/3 percent test, which is to prevent the practice known as "backloading of benefits." *Hoover v. Cumberland, Md. Area Teamsters Pension Fund*, 756 F.2d 977, 982 n.10 (3d Cir. 1985). As explained in the House Report on ERISA:

> The primary purpose of [minimum accrual rates] is to prevent attempts to defeat the objectives of the minimum vesting provisions by providing undue "backloading," i.e., by providing inordinately low rates of accrual in the employee's early years of service when he is most likely to leave the firm and by concentrating the accrual of benefits in the employee's later years of service when he is most likely to remain with the firm until retirement.

H.R. Rep. No. 93-807 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4688. In other words, the test applies to how a given plan operates at a given time and prevents it

from being unfairly weighted against shorter-term employees; but it is irrelevant to across-the-board increases in benefit rates made at some future time on behalf of all current employees regardless of period of service. Indeed, it would be a strange rule that would prohibit a fund from making more than a one-third increase in its across-the-board benefit rate unless that rule were retroactively applied to all former employees; yet this would be the effect of plaintiff's interpretation. Accordingly, we conclude that defendants did not violate the 133 1/3 percent test by pro rating his monthly benefit in accordance with the Plan's separation provisions.

Langman's fall-back argument is that, even if such pro rating were otherwise permissible, it should not apply in his case, because he did not in fact suffer the kind of separation that implicates such pro rating, at least prior to 1994. So far as any benefits that vested prior to that time, the relevant separation provision is the 1984 separation provision, which (in language not retained in the 1994 separation provision) defines a separated employee as someone who has sustained a "One Year Break." The "Definitions" section of the 1984 Plan in turn defines a "One Year Break" simply as "any calendar year in which a Participant failed to work more than 500 hours for an Employer." Article I, §3. But elsewhere, in defining length of service for Plan eligibility and vesting purposes, Article II, §7 of the 1984 Plan states in pertinent part:

> A Participant's hours of work for the same Employer immediately before the Participant was transferred into the bargaining unit for which that Employer was required to make contributions to the Fund or immediately following transfer from such a bargaining unit shall be counted in determining his Vesting Service and in determining whether or not he had incurred a One Year Break.

If this latter section were applied to the calculation of "One Year Break" as used in the 1984 separation provision, Langman would not have suffered a "One Year Break," since he was transferred from a covered position at Waldbaum's to a non-covered position at the same employer, where he remained for all but four months of the time before he once again obtained a covered position with a different employer.

We conclude, however, that the special refinement of "One Year Break" set forth in Article II, §7 of the Plan does not apply to "One Year Break" as used elsewhere in the 1984 Plan, for if so it logically would have been included in the general definition of that term found in the Definitions section of the Plan, Article I, §3. Instead, the special refinement appears only in Article II, §7, and it was added there for a specific reason: to ensure compliance with a Department of Labor Regulation that provides in pertinent part that "in determining an employee's service for eligibility to participate and vesting purposes, all covered service with an employer or employers maintaining the plan and all contiguous noncovered service with an employer or employers maintaining the plan shall be taken into account." 29 C.F.R. § 2530.210(c)(1). Neither this regulation, nor the language of Article II, §7 that applies it, has any relevance to the separation provision relating to calculation of the benefit rate, and consequently is irrelevant here.

While Langman makes several other arguments -- all of which we have carefully considered, and rejected -- the only other one deserving mention is his claim that none of the Summary Plan Descriptions that were made available to employees between 1984 and 1996 informed Plan participants who had previously suffered a separation that they would be subject to a pro rating of their benefit rates. But Langman has failed to show how he was prejudiced by this omission. Indeed, at the time he separated from service, the benefit rate was $ 5, and under defendants' calculation he

received the significantly higher benefit rate of $ 20 for the pre-separation period. After he returned, he received all subsequent benefit increases for his post-separation employment. Thus, the failure to inform him of the freeze at no point prejudiced him. *See Veilleux v. Atochem N. Am., Inc.*, 929 F.2d 74, 76 (2d Cir. 1991) (denying plaintiffs recovery for a disclosure violation where they suffered no "cognizable prejudice").

Accordingly, for the foregoing reasons, we affirm the district court's grant of summary judgment in favor of defendants.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

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SOLOMON LANGMAN

Plaintiff,

97 Civ. 6063 (MGC)

-against-

OPINION

EMMANUEL LAUB, JAMES JOHNSON, MEL WEITZ, HAROLD FRIEDMAN, JON GREENFIELD, SAM PELTZ, MANUEL MONACO, HECTOR TORRES and SIDNEY BLUMGOLD, Trustees of Local 338 Retirement Fund; RETAIL, WHOLESALE AND CHAIN STORE FOOD EMPLOYEES UNION LOCAL 338 RETIREMENT TRUST BOARD OF TRUSTEES, Administrator of Local 338 Retirement Fund; and LOCAL 338 RETIREMENT FUND

Defendants.

APPEARANCES:)

SCOTT M. REIMER
Attorney for Plaintiff
60 East 42nd Street, 47th Floor
New York, New York 10165
(212) 297-0700
By: Scott M. Reimer, Esq.

FRIEDMAN WOLF & GRISI,
Attorneys for Defendants
1500 Broadway, 23rd Floor

New York, New York 10036
(212) 354-4500
By: William K. Wolf, Esq.

CEDARBAUM, J.

Plaintiff Solomon Langman sues the Trustees of the Local 338 Retirement Fund (the "Fund") and the Fund on the ground that the Trustees' calculation of his retirement benefits violates the Employee Retirement Income Security Act ("ERISA"). Specifically, plaintiff complains: 1) that the Trustees decreased his accrued benefit in violation of section 204(g) of ERISA, *29 U.S.C. §1054*(g), and section 411(d)(6) of the Internal Revenue Code; and 2) that the Trustees' calculation was an arbitrary and capricious interpretation of the Local 338 Retirement Plan. He also seeks attorney's fees pursuant to ERISA section 502(g)(1), *29 U.S.C. §1132*(g)(1).

Both sides have moved for summary judgment on undisputed facts. In his motion for summary judgment, plaintiff asserts, for the first time, the following additional claims: 1) that the Trustees failed to give adequate notice of the Plan's provisions in the Summary Plan Description; and 2) that the Trustees' calculation fails to meet any of the three accrual schedules as required by *29 U.S.C. § 1054*(b)(1). For the reasons that follow, plaintiff's motion for summary judgment is denied with respect to all claims. Defendants' motion for summary judgment is granted with respect to all claims except the claim for attorneys' fees.

BACKGROUND

Both sides have agreed on all material facts. The Fund is a multi-employer pension plan as defined by ERISA. *29 U.S.C. §1002*(37)(A). It provides pension benefits to employees and former employees of employers with collective bargaining agreements with Retail, Wholesale & Chain Food Store Employees Union Local 338 ("Local 338"). The Fund is operated pursuant to the Agreement and

Declaration of Trust (the "Trust Agreement"), and the Local 338 Retirement Plan (the "Plan"), as amended and restated in 1994 ("1994 Plan"). The main provisions of the 1994 Plan are summarized in the Summary Plan Description of the Local 338 Retirement Plan ("SPD"), as amended in 1996. The Plan had been amended and restated previously in 1981 ("1981 Plan") and in 1984 ("1984 Plan").

On December 15, 1953, Langman became a member of Local 338 and a participant in the Fund. From 1953 through August 8, 1973, he worked at Waldbaum's, Inc. ("Waldbaum's"), in a position covered by the Plan. In 1973, he was transferred to a position at Waldbaum's which was not covered by the Plan. He worked in that position from 1973 through June of 1979. In June of 1979, Langman left Waldbaum's. In October of 1979, he began work for another employer, in a job covered by the Plan. On May 1, 1996, he retired. At the time of his retirement, he had worked in employment covered by the Plan for a total of 32.666 years.

In July of 1996, Langman submitted an application to the Fund for an unreduced early retirement pension under the 1994 Plan, which provided for:

> unreduced early retirement on the first day of any month coincident with or next following the date on which he has both attained age 60 and completed at least 30 years of Benefit Service provided he has [*4] worked 1,5000 or more hours...in each of the 5 full Plan Years immediately preceding his retirement.

1994 Plan, Art. III(2)(a). Under the Plan, an applicant receives upon retirement a monthly benefit equal to the number of years of the applicant's "benefit service," multiplied by the "benefit rate" in the last plan year in which the applicant worked. The benefit rate for 1974 was $ 5.00 per month for each year of service, the monthly benefit rate

for 1984 was $ 20.00 per month for each year of service, and the monthly benefit rate for 1996 was $50.00 per month for each year of service. For example, if a retiree under the Plan had worked ten uninterrupted years, from 1986 to 1996, he would have received a monthly benefit of ten (the number of years worked) multiplied by $50.00 per month for each year of service (the benefit rate in 1996), or $500.00 per month.

The Trustees initially determined plaintiff's monthly retirement benefit to be $ 733.33. In calculating Langman's retirement benefit, the Trustees determined that he had incurred a "separation from employment" from 1974 to 1979 within the meaning of Article V(7) of the 1994 Plan. That provision states:

> An Employee shall be deemed to have separated from employment on the last day in which he receives an Hour of Service which is followed by a Plan Year in which he receives fewer than 500 Hours of Service. If such Employee subsequently returns to employment his pension amount will be determined on a pro rata basis. The amount of pension based on Benefit Service earned before his separation from employment shall be determined under the terms of the Plan on his first separation from employment. If after his return as an employee he earns three or more years of Vesting Service, the amount of pension based on Benefit Service earned after his separation from employment shall be determined under the terms of the Plan on his subsequent separation from employment.

1994 Plan, Art. V(7) (the "separation provision"). A similar provision was included, for the first time, in the 1984 Plan. Prior to 1984, the Plan did not provide for the freezing of an

applicant's benefit rate for service occurring prior to a separation from employment.

The Trustees multiplied the number of plaintiff's pre-separation years of service, twenty, by the 1973 benefit rate of $5.00 per month for each year of service, which resulted in a monthly benefit of $100.00 attributable to his 1953-1973 employment. They also multiplied the number of plaintiff's post-separation years of service, twelve and two-thirds, by the 1996 benefit rate of $50.00 per month for each year of service, which resulted in a $633.33 monthly benefit for that period. The total monthly retirement benefit was the sum, $733.33.

After plaintiff appealed the initial award, the Trustees increased his total monthly retirement benefit to $1033.33. They reached this number by increasing the benefit rate applicable to his pre-separation service to the 1984 benefit rate of $ 20.00 per month for each year of service. The twenty dollars per month rate multiplied by the twenty years of pre-separation service resulted in a $ 400.00 monthly benefit for his service from 1953-1973.

DISCUSSION

I. Impermissible decrease under section 204(g)(1) of ERISA

Plaintiff first argues that defendants' denial of his request for increased benefits violated section 204(g)(1) of ERISA, *29 U.S.C. §1054*(g)(1). That section states that "the accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) or 1441 of this title." *29 U.S.C. §1054*(g)(1).

Plaintiff first argues that the Trustees' application of the separation provision to his pre-separation years of service, by itself, violated section 1054(g)(1). However, the fact that the Trustees applied Article IV(6) of the 1984 Plan to a pre-1984

separation from employment is irrelevant if the amendment did not decrease Langman's monthly benefit as the term is defined by the Plan. For example, if the Trustees had frozen the benefit rate for each of plaintiff's pre-separation years of service at fifty dollars per month, the current level, such a freeze would not have violated section 1054(g)(1). Plaintiff cites *Rybarczyk v. TRW, Inc., 235 F.3d 97. (6th Cir. 2000),* but the language plaintiff cites simply states that a plan amendment may not reduce the accrued benefit for pre-amendment service. *Rybarczyk, 235 F.3d at 983.*

Thus, the issue is whether plaintiff's monthly benefit was in fact reduced. The Trustees applied the 1984 benefit rate of twenty dollars per month to plaintiff's pre-separation years of service. As of 1984, the Trustees would have applied the 1984 benefit rate to plaintiff's pre-1984 years of service, with or without the separation provision. Therefore, the Trustees' application of the separation provision did not retroactively reduce plaintiff's monthly benefits because they applied the same rate to plaintiff's pre-separation years of service that they would have applied without the amendment.

Plaintiff also argues that, at the time of the 1984 amendment, the Plan required the Trustees to apply to his pre-separation years of service the benefit rate of his last year of employment; that he reasonably expected to work beyond 1984; and that he reasonably expected that the benefit rate would increase after 1984. However, failure to provide a benefit that plaintiff "reasonably expected" to receive in the future does not constitute an impermissible "decrease" in accrued benefits in violation of *29 U.S.C. § 1054*(g)(1).

II. Review of the Trustees' Interpretation of the Plan

Plaintiff also argues that the Trustees interpreted the Plan in an arbitrary and capricious manner because even as written, the terms of the separation provision did not apply to plaintiff. A court may not review an ERISA plan

administrator's interpretation of the plan de novo if the plan specifically reserves to the administrator discretionary authority to interpret the terms of the plan. *Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115, 103 L. Ed. 2d 80, 109 S. Ct. 948 (1989).* Under such circumstances, the administrator's interpretation is reviewed under the more deferential "arbitrary and capricious" standard. *Pulvers v. First Unum Life Ins. Co., 210 F.3d 89, 92 (2d Cir. 2000).* In this case, the Trust Agreement gives the Trustees "full, final and conclusive authority to determine questions of...amounts of benefits...and all other related matters." Therefore, the Trustees' interpretation of the Plan may be overturned only if it is arbitrary and capricious. Under this standard, "where both the trustees of a pension fund and a rejected applicant offer rational, though conflicting, interpretations of plan provisions, the trustees' interpretation must be allowed to control." *O'Shea v. First Manhattan Co. Thrift Plan & Trust, 55 F.3d 109, 112 (2d Cir. 1995)* (quoting *Miles v. New York State Teamsters Conf. Pension & Ret. Fund Employee Pension Benefit Plan, 698 F.2d 593, 601 (2d Cir. 1983)).* [*10]

Plaintiff argues that the Trustees' denial of his claim for increased benefits was arbitrary and capricious because the Trustees' interpretation of the separation provision of the 1994 Plan contradicts Article II(3) of the 1994 Plan. Article II(3) states in part:

> A Participant's hours of work for the same Employer immediately...following transfer from employment under a Collective Bargaining Agreement shall be counted in determining his Vesting Service and in determining whether or not he had incurred a Break in Service.

1994 Plan, Art. II(3) (as amended December 17, 1996) (hereinafter referred to as the "transfer" provision). Because

plaintiff was employed at a covered unit of Waldbaum's from 1953-1973, then immediately transferred to a non-covered unit of the same employer, he did not incur a "Break in Service" as used in the transfer provision. Plaintiff argues that a "Break in Service" as used in the transfer provision is the same as a "separation from employment" for purposes of the separation provision, and that he therefore did not incur a "separation from employment" as used in the separation provision. Because he did not incur a separation from employment, plaintiff argues, the Trustees erred in applying the separation provision to plaintiff's pre-1974 years of service.

Defendants respond that the transfer provision was meant to apply only to an employee's initial eligibility for benefits, and not to the subsequent computation of benefits. In support of their argument, defendants also cite Department of Labor Regulation Section 530.210(c)(1), which provides in part:

> In determining an employee's service for eligibility to participate and vesting purposes, all covered service with an employer or employers maintaining the plan and all contiguous noncovered service with an employer or employers maintaining the plan shall be taken into account.

29 C.F.R. §2530.210(c)(1). Defendants contend that Article II(3) was enacted purely to comply with the requirements of that regulation. Therefore, defendants argue, the Trustees reasonably interpreted the transfer provision as applying only to potential forfeitures of Vesting Service and Benefit Service.

The language of the Plan indicates that the transfer provision does not apply to calculation of benefits under the separation provision. The transfer provision determines whether or not an applicant has incurred a "Break in

Service," whereas the separation provision refers to employees who have "separated from employment." The two terms are also defined slightly differently. A "Break in Service" is defined as "a Plan Year in which an Employee does not earn more than 500 Hours of Service." An employee is deemed to have separated from employment in a "Plan Year in which he receives fewer than 500 Hours of Service." Additionally, the fact that the term "Break in Service" is capitalized and defined in Article I suggests that the term has independent meaning from the term "separated from employment."

An analysis of the transfer provision in the context of the entire Plan also supports defendants' position. Article II, which contains the transfer provision, is entitled "Benefit Service and Vesting Service." The separation provision, on the other hand, is part of Article V, entitled "Payment of Pension." As their titles suggest, Article II sets out the manner in which a Plan participant gains years of service, and Article V deals with the calculation of pension payments upon retirement. The two articles are not entirely unrelated; as [*13] noted previously, an applicant's Benefit Service, defined in Article II, determines the amount of the applicant's monthly benefit upon retirement, as calculated in Article V. Nevertheless, an analysis of the language of the two provisions, as well as the entire Plan, shows that defendants' interpretation was not arbitrary and capricious.

Plaintiff also contends that defendants' interpretation of Article II(3) should not be accepted because the Trustees did not offer that interpretation in their initial denial letters to plaintiff. Plaintiff asserts that this omission violated *29 U.S.C. §1133,* which requires that the Trustees give notice to plaintiff of the "specific reasons for the denial" of a claim for benefits. However, section 1133 only required the Trustees to give the reason for the denial. It did not also require the Trustees to foresee and counter, in their initial denial letter, every argument plaintiff might make in a subsequent legal

proceeding. See, e.g., *Gallo v. Amoco Corp., 102 F.3d 918, 922 (7th Cir. 1996).* The Trustees explained in their denial letters that the Plan and its separation provision required the Trustees to calculate [*14] the benefit for plaintiff's pre-separation service at the pre-separation rate. This was sufficient to satisfy the notice requirements of section 1133.

Plaintiff also cites *Shelden v. Barre Belt Granite Employer Union Pension Fund, 25 F.3d 74 (2d Cir. 1994)* and *Juliano v. HMO of New Jersey, Inc., 221 F.3d 279 (2d Cir. 2000).* In Shelden, the fund denied the plaintiff's request for disability pension benefits on the ground that the plaintiff had not survived for six months after the date of his disability. However, the magistrate judge's report, which was adopted by the district court, recommended denial of plaintiff's claim because the employee had failed to submit an application for benefits while he was alive. See *Shelden, 25 F.3d at 76-78.* The Court of Appeals reversed the district court's decision because the magistrate judge's understanding of the fund's reason for denying benefits was "contradicted by all of the Fund's prior representations as to its reasons." *Id. at 79.* Here, by contrast, the Trustees consistently stated in the denial letters that the separation provision of the Plan requires the monthly benefit for plaintiff's pre-separation service to be calculated at the pre-separation rate. *Juliano* is similarly inapplicable to this case.

III. The Summary Plan Description

In his motion for summary judgment, plaintiff for the first time puts forward two additional contentions. First, plaintiff argues that the Trustees violated ERISA by failing to describe the effect of the separation provision in the SPD. ERISA requires that an employer provide to its employees a summary of the benefits plan, containing among other things a description of the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits...." *29 U.S.C. §1022*(b). Plaintiff argues that the SPD failed to

meet ERISA's disclosure requirements because the SPD did not inform him of the effect of the separation provision on his benefits. It is undisputed that the 1994 SPD, the only version provided by the parties, does not refer to the separation provision or its potential effect on plaintiff's benefits. Plaintiff argues that because the SPD failed to notify him of the effect of the separation provision, the SPD's terms should control over any "inconsistent" provisions in the Plan.

However, plaintiff has not shown that defendants' omission of the separation provision from the SPD caused him any monetary loss. A plaintiff may bring an action against a plan administrator "for any damages that result from the failure to disclose." *Howard v. Gleason Corp., 901 F.2d 1154, 1159 (2d Cir. 1990).* In *Estate of Becker v. Eastman Kodak Co., 120 F.3d 5 (2d Cir. 1997),* the defendant company's plan allowed employees to receive a single lump-sum payment at retirement instead of a monthly benefit, an option described in the SPD as well. However, the SPD did not explain that the lump-sum option was not available to employees who died before the effective date of retirement. The Second Circuit ruled that this omission was a violation of ERISA, but did not "grant entry of judgment for plaintiffs because there remains the question of causation." *Eastman, 120 F.3d at 10.* Rather, it remanded the case to the district court for a determination of whether "the SPD caused Becker to delay electing her retirement." Id. Similarly, in *Veilleux v. Atochem North America, Inc., 929 F.2d 74 (2d Cir. 1991),* the Second Circuit determined that the plaintiffs "demonstrated no cognizable prejudice from [defendant's] failure to fully comply with ERISA's disclosure requirements," and were therefore not entitled to damages. *Veilleux, 929 F.2d at 76.*

The Trustees amended the Plan in 1984 to include the separation provision, five years after plaintiff had returned to covered employment. Therefore, plaintiff would have been

in the same position even if the Trustees had included a description of the separation provision in the 1984 SPD. The Trustees applied the separation provision to plaintiff, and this decision was not arbitrary or capricious.

IV. Enumeration Requirements Under *29 U.S.C. 1054*(b)(1)

Finally, plaintiff also argues that the Plan fails to satisfy any of the three accrual schedules listed in *29 U.S.C. § 1054*(b)(1). "Defined benefit" plans, including the Plan, must satisfy one of the following tests: the "three percent" test, *29 U.S.C. §1054*(b)(1)(A), the "133 1/3 percent" test, *29 U.S.C. §1054*(b)(1)(B), or the "fractional" test, *29 U.S.C. §1054*(b)(1)(C).

A defined benefit plan complies with the 133 1/3 percent test if:

> the accrued benefit payable at the normal retirement age is equal to the normal retirement benefit and the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year is not more than 133 1/3 percent of the annual rate at which he can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year.

29 U.S.C. §1054(b)(1)(B). In other words, a plan complies with the 133 1/3 percent test if a participant does not accrue monthly benefits in any plan year at a rate higher than 133 1/3 percent of the rate in any previous plan year. Under the Trustees' final calculation, plaintiff accrued monthly benefits at the rate of $ 50.00 for years of service from 1980-1996, and at the monthly rate of $ 20.00 for years of service from 1953-1973. Thus, plaintiff accrued monthly benefits from

1980 to 1996 at a rate that was 250 percent of the rate at which he accrued benefits from 1953 to 1973. From this, plaintiff argues that the Trustees' determination fails the 133 1/3 percent test.

However, as defendants note, ERISA provides a different method for calculating the rate of accrual with respect to years before the effective date of ERISA. ERISA went into effect in 1974. Accordingly, all of plaintiff's service between 1953 and 1973 predated ERISA. The statute provides in pertinent part:

> Subparagraphs (A), (B) and (C) [defining the requirements of the three tests] shall not apply with respect to years of participation before the first plan year to which this section applies but a defined benefit plan satisfies the requirements of this subparagraph with respect to such years of participation only if the accrued benefit of any participant with respect to such years of participation is not less than . . . one-half of the accrued benefit to which such participant would have been entitled if subparagraphs (A), (B), or (C) applied with respect to such years of participation.

29 U.S.C. § 1054(b)(1)(D). In other words, the Trustee's interpretation satisfies the 133 1/3 percent test if the applicant accrued benefits for any pre-1974 plan year at one-half the rate that the test would otherwise allow.

Plaintiff accrued monthly benefits for each of his post-1974 years of service at the rate of $50.00. Normally, under the 133 1/3 percent test, plaintiff would have had to accrue monthly benefits for each of his pre-1974 years at a minimum benefit rate of $50.00 per month, divided by 133 1/3 percent, or $37.50. However, under the method of calculation for pre-ERISA years provided in section

1054(b)(1)(D), the 133 1/3 percent test is satisfied if plaintiff accrued monthly benefits for pre-1974 plan years at half that rate, or $17.75. Plaintiff accrued monthly benefits at the rate of $20.00 in each of his pre-1974 plan years. Therefore, the Trustees' final determination satisfies the 133 1/3 percent test.

Plaintiff argues that the section 1054(b)(1)(D) formula does not apply unless the Plan contains a provision explicitly electing the method of calculation set out in that section for pre-ERISA years. In support of his argument, plaintiff cites the following excerpt from the House Conference Report that accompanied H.R. 2, the House bill enacted as ERISA:

> The plan may choose which of the 3 standards it wishes to apply for the past (subject to the antidiscrimination rules); however, the same standard must be applied to all the plan's participants.

H.R. Conf. Rep. No. 93-1280 (1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5057. This language is not in the statute and does not require that the Plan contain a provision explicitly electing to apply the method of calculation found in section 1054(b)(1)(D).

V. Attorneys' Fees

Both sides have requested attorneys' fees pursuant to *29 U.S.C. §1132*(g)(1). In *Chambless v. Masters, Mates & Pilots Pension Plan, 815 F.2d 869, 871 (2d Cir. 1987),* the Second Circuit set out five factors to consider, including:

> (1) the degree of the offending party's culpability or bad faith, (2) the ability of the offending party to satisfy an award of attorney's fees, (3) whether an award of fees would deter other persons from acting similarly under like

> circumstances, (4) the relative merits of the parties' positions, and (5) whether the action conferred a common benefit on a group of pension plan participants.

Chambless, 815 F.2d at 871. Despite defendants' arguments to the contrary, there is no evidence of culpability or bad faith on anyone's part. The parties have not presented any evidence on the issue of their relative ability to pay. Although plaintiff has not succeeded, his claims were not frivolous. Therefore, an award of fees would not and should not deter other potential plaintiffs from asserting equally non-frivolous claims. Accordingly, neither party is entitled to attorneys' fees.

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment is granted and plaintiff's motion for summary judgment is denied. The parties' requests with respect to attorneys' fees are denied.

SO ORDERED

Dated: New York, New York
March 28, 2002

s/Miriam Goldman Cedarbaum
MIRIAM GOLDMAN CEDARBAUM
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL UNITED STATES
COURTHOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHINE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 31st day of July two thousand three.

Langman,

Plaintiff-Appellant

Dkt No. 02-7457

v.

Laub,

Defendant-Appellee

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Solomon Langman.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has

been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By: s/Arthur M. Heller
Arthur M. Heller,
Motions Staff Attorney

EXHIBIT D

STATUTES AND REGULATIONS

ERISA §2(a), 29 U.S.C. § 1001.
"Congressional findings and declaration of policy"

(a) Benefit plans as affecting interstate commerce and the Federal taxing power. The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum

standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

ERISA §102, 29 U.S.C. § 1022
"Summary Plan Description"

(a) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 104(b). The summary plan description shall include the information described in subsection (b), shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 104(b)(1).

(b) The summary plan description shall contain the following information: The name and type of administration of the plan; in the case of a group health plan (as defined in section 733(a)(1) whether a health insurance issuer (as defined in section 733(b)(2) is responsible for the financing or administration (including payment of claims) of the plan and (if so) the name and address of such issuer; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the

name and address of the administrator; names, titles and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan including the office at the Department of Labor through which participants and beneficiaries may seek assistance or information regarding their rights under this Act and the Health Insurance Portability and Accountability Act of 1996 with respect to health benefits that are offered through a group health plan (as defined in section 733(a)(1) and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 503 of this Act.

29 C.F.R. §2520.102-2
"Style and format of summary plan description"

(a) Method of presentation. The summary plan description shall be written in a manner calculated to be understood by the average plan participant and shall be sufficiently comprehensive to apprise the plan's participants and beneficiaries of their rights and obligations under the plan. In fulfilling these requirements, the plan administrator shall exercise considered judgment and discretion by taking into account such factors as the level of comprehension and education of typical participants in the plan and the complexity of the terms of the plan. Consideration of these

factors will usually require the limitation or elimination of technical jargon and of long, complex sentences, the use of clarifying examples and illustrations, the use of clear cross references and a table of contents.

(b) General format. The format of the summary plan description must not have the effect to misleading, misinforming or failing to inform participants and beneficiaries. Any description of exception, limitations; reductions, and other restrictions of plan benefits shall not be minimized, rendered obscure or otherwise made to appear unimportant. Such exceptions, limitations, reductions, or restrictions of plan benefits shall be described or summarized in a manner not less prominent than the style, captions, printing type, and prominence used to describe or summarize plan benefits. The advantages and disadvantages of the plan shall be presented without either exaggerating the benefits or minimizing the limitations. The description or summary of restrictive plan provisions need not be disclosed in the summary plan description in close conjunction with the description or summary of benefits, provided that adjacent to the benefit description the page on which the restrictions are described is noted.

ERISA §204(b)(1), 29 U.S.C. §1054(b)(1)
"Benefit Accrual Requirements"

(b) Enumeration of plan requirements.

(1) (A) A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which each participant is entitled upon his separation from the service is not less than—

(i) 3 percent of the normal retirement benefit to which he would be entitled at the normal retirement age if he commenced participation at the earliest possible entry age under the plan and served continuously until the earlier of age 65 or the normal retirement age specified under the plan,

multiplied by

(ii) the number of years (not in excess of 33 1/3) of his participation in the plan.

In the case of a plan providing retirement benefits based on compensation during any period, the normal retirement benefit to which a participant would be entitled shall be determined as if he continued to earn annually the average rate of compensation which he earned during consecutive years of service, not in excess of 10, for which his compensation was the highest. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

(B) A defined benefit plan satisfies the requirements of this paragraph of a particular plan year if under the plan the accrued benefit payable at the normal retirement age is equal to the normal retirement benefit and the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year is not more than 133 1/3 percent of the annual rate at which he can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year. For purposes of this subparagraph—

(i) any amendment to the plan which is in effect for the current year shall be treated as in effect for all other plan years;

(ii) any change in an accrual rate which does not apply to any individual who is or could be a participant in the current year shall be disregarded;

(iii) the fact that benefits under the plan may be payable to certain employees before normal retirement age shall be disregarded; and

(iv) social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after

the current year.

(C) A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which any participant is entitled upon his separation from the service is not less than a fraction of the annual benefit commencing at normal retirement age to which he would be entitled under the plan as in effect on the date of his separation if he continued to earn annually until normal retirement age the same rate of compensation upon which his normal retirement benefit would be computed under the plan, determined as if he had attained normal retirement age on the date any such determination is made (but taking into account no more than the 10 years of service immediately preceding his separation from service). Such fraction shall be a fraction, not exceeding 1, the numerator of which is the total number of his years of participation in the plan (as of the date of his separation from the service) and the denominator of which is the total number of years he would have participated in the plan if he separated from the service at the normal retirement age. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

(D) Subparagraphs (A), (B), and (C) shall not apply with respect to years of participation before the first plan year to which this section applies but a defined benefit plan satisfies the requirements of this subparagraph with respect to such years of participation only if the accrued benefit of any participant with respect to such years of participation is not less than the greater of—

(i) his accrued benefit determined under the plan, as in effect from time to time prior to the date of the enactment of this Act [enacted Sept. 2, 1974], or

(ii) an accrued benefit which is not less than one-half of the accrued benefit to which such participant would have been entitled if subparagraph (A), (B), or (C) applied with respect to such years of participation.

(E) Notwithstanding subparagraphs (A), (B), and (C) of this paragraph, a plan shall not be treated as not satisfying the requirements of this paragraph solely because the accrual of benefits under the plan does not become effective until the employee has two continuous years of service. For purposes of this subparagraph, the term "year of service" has the meaning provided by section 202(a)(3)(A).

(F) Notwithstanding subparagraphs (A), (B), and (C), a defined benefit plan satisfies the requirements of this paragraph if such plan—

(i) is funded exclusively by the purchase of insurance contracts, and

(ii) satisfies the requirements of paragraphs (2) and (3) of section 301(b)(relating to certain insurance contract plans),

but only if an employee's accrued benefit as of any applicable date is not less than the cash surrender value his insurance contracts would have on such applicable date if the requirements of paragraphs (4), (5), and (6) of section 301(b) were satisfied.

(G) Notwithstanding the preceding subparagraphs, a defined benefit plan shall be treated as not satisfying the requirements of this paragraph if the participant's accrued benefit is reduced on account of any increase in his age or service. The preceding sentence shall not apply to benefits under the plan commencing before benefits payable under title II of the Social Security Act which benefits under the plan—

(i) do not exceed social security benefits, and

(ii) terminate when such social security benefits commence.

(H) (i) Notwithstanding the preceding subparagraphs, a defined benefit plan shall be treated as not satisfying the requirements of this paragraph if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age.

(ii) A plan shall not be treated as failing to meet the requirements of this subparagraph solely because the plan imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(iii) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan—

(I) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subparagraph for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(II) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 206(a)(3), and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 203(a)(3)(B), then any requirement of this subparagraph for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The preceding provisions of this clause shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations may provide for the application of the preceding provisions of this clause, in the case of any such employee, with respect to any period of time within a plan year.

(iv) Clause (i) shall not apply with respect to any employee who is a highly compensated employee (within the

meaning of section 414(q) of the Internal Revenue Code of 1986 to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of the Internal Revenue Code of 1986.

(v) A plan shall not be treated as failing to meet the requirements of clause (i) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals.

(vi) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of the Internal Revenue Code of 1986 shall apply with respect to the requirements of this subparagraph in the same manner and to the same extent as such regulations apply with respect to the requirements of such section 411(b)(1)(H).

26 C.F.R. §1.411(b)-1(b)(2)
"133 1/3 Percent Rule"

(2) 133 1/3 percent rule--(i) General rule. A defined benefit plan satisfies the requirements of this subparagraph for a particular plan year if—

(A) Under the plan the accrued benefit payable at the normal retirement age (determined under the plan) is equal to the normal retirement benefit (determined under the plan), and

(B) The annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year cannot be more than 133 1/3 percent of the annual rate at which he can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year.

(ii) Special rules. For purposes of this subparagraph—

(A) Plan amendments. Any amendment to the plan which is in effect for the current plan year shall be treated as if it

were in effect for all other plan years.

(B) Change in accrual rate. Any change in an accrual rate which change does not apply to any individual who is of could be a participant in the plan year is disregarded. Thus, for example, if for its plan year beginning January 1, 1980, a defined benefit plan provides an accrued benefit in plan year 1980 of 2 percent of a participant's average compensation for his highest 3 years of compensation for each year of service and provides that in plan year 1981 the accrued benefit will be 3 percent of such average compensation, the plan will not be treated as failing to satisfy the requirements of this subparagraph for plan year 1980 because in plan year 1980 the change in the accrual rate does not apply to any individual who is or could be a participant in plan year 1980. However, if, for example, a defined benefit plan provided for an accrued benefit of 1 percent of a participant's average compensation for his highest 3 years of compensation for each of the first 10 years of service and 1.5 percent of such average compensations for each year of service thereafter, the plan will be treated as failing to satisfy the requirements of this subparagraph for the plan year even though no participant is actually accruing at the 1.5 percent rate because an individual who could be a participant and who had over 10 years of service would accrue at the 1.5 percent rate, which rate exceeds 133 1/3 percent of the 1 percent rate.

ERISA §404(a), 29 U.S.C. §1104(a)
"Fiduciary Duties"

(a) Prudent man standard of care.

(1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and title IV.

ERISA §502(e), 29 U.S.C. §1132(e)
"Jurisdiction"

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 101(f)(1) State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.